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#### **APPEAL**

#### $\S\S2-4(a), 2-6(a)$

**People v. Daniels**, 2016 IL App (1st) 142130 (No. 1-14-2130, 6/20/16)

- 1. A nolle prosequi is the formal entry by the State declaring that it is unwilling to prosecute certain charges. It terminates those charges against the defendant and leaves the matter as it was before charges were filed. A nolle prosequi is not a final disposition of the case and will not bar another prosecution for the same offense. But where the State "causes the entrance of an unconditional nolle prosequi," the proceeding is terminated and the same indictment cannot be reinstated at a subsequent term. The State may only reinstate a nolled charge by asking the trial court to vacate the nolle order before jeopardy attaches. Alternatively, the State may file a new charge to initiate separate proceedings against a defendant.
- 2. The State charged defendant with multiple counts of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon. As part of negotiated guilty plea, the State *nolled* all the charges except one count of AUUW and defendant pled guilty to that count. After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.
- 3. On appeal, the State conceded that defendant's conviction should be vacated but asked the Appellate Court to remand the case to the trial court to reinstate six of the *nolled* charges. The Appellate Court vacated defendant's conviction but denied the State's request to reinstate the charges.

The court first noted that the State never asked the trial court to reinstate the charges nor did it file new charges to initiate a separate proceeding. The appeal related solely to the dismissal of defendant's 2-1401 petition, which was an altogether new proceeding, not a continuation of defendant's criminal case. That case ended when defendant pled guilty. The Appellate Court thus lacked jurisdiction to address issues related to the *nolled* counts.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

#### BATTERY, ASSAULT & STALKING OFFENSES

§7-2(a)

**People v. Relerford**, 2016 IL App (1st) 132531 (No. 1-13-2531, 6/24/16)

720 ILCS 5/12-7.3(a)(1) and (a)(2) provide that a person commits stalking when he or she "knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person" to "fear for his or her safety or the safety of a third person" (§12-7.3(a)(1)) or suffer emotional distress (§12-7.3(a)(2)). Defendant was convicted of stalking under §12-7.3(a)(2) after he made statements and stood outside a business where he had worked as an intern.

In **Elonis v. United States**, 575 U.S. \_\_\_\_, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2015), the U.S. Supreme Court held that due process precludes a federal stalking conviction premised solely on how the defendant's actions would be understood by a reasonable person. The Supreme Court noted that although an objective standard is widely used in civil law, due process permits a conviction only if the prosecution shows, at a minimum, that defendant acted with an awareness that he was doing something wrong.

Because the stalking statute defines liability in terms of the effect of the defendant's action on a reasonable person, the statute lacks a *mens rea* requirement and is therefore facially unconstitutional under the due process clause. Although defendant was convicted only of violating subsection (a)(2), the court concluded that the same defect applies to subsection (a)(1) and to subsections (a)(1) and (a)(2) of the cyberstalking statute (720 ILCS 5/12-7.5(a)(1), (2)). The latter statute defines the offense of cyberstalking as the use of electronic means to transmit communications which the defendant knows or should know would cause a reasonable person to fear for his or her safety or suffer emotional distress.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

#### **COLLATERAL REMEDIES**

 $\S\S9-1(a), 9-1(g), 9-1(k),$ 

**People v. Montanez**, 2016 IL App (1st) 133726 (No. 1-13-3726, 6/7/16)

1. To obtain post-conviction relief due to actual innocence, the petitioner must present new, material, noncumulative evidence of such a conclusive character as to probably change the result on retrial. Whether evidence is conclusive depends on whether it places the trial evidence in such a different light as to undercut confidence in the factual

correctness of the verdict. The post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the trial court grants a directed finding after the petitioner's case is presented at a third-stage evidentiary hearing, the decision is reviewed *de novo*. When presented with a motion for a directed finding, the trial court must construe the evidence in the light most favorable to the nonmovant.

2. Where the only direct evidence of the petitioner's guilt of murder was the testimony of a witness who repudiated his statement completely in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated by other witnesses, and there was no physical evidence connecting defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

Recantations of trial testimony are to be viewed with suspicion, but are not to be simply dismissed without further analysis. The court noted that there were reasons to be concerned about the veracity of the witness's testimony even at trial, as he was an admitted heroin addict, had a lengthy criminal history, and received a nine-year sentence for four felony cases on which he faced 100 years in prison. In addition, there was evidence that the witness had admitted years earlier that he had testified falsely, and the judge commented at trial that the witness's testimony was crucial for a conviction. Under these circumstances, the witness's affidavit recanting his trial testimony undeniably called critical evidence into question.

The recantation was significantly corroborated by testimony of another witness that he was coerced by the same detective to give false testimony against the defendant and that he received special treatment in prison after he implicated defendant and his co-defendant. The witness also testified that when he decided not to testify falsely, the detective took away his special privileges and again tried to solicit false testimony.

An additional witness, the decedent's wife, was not allowed to testify at the post-conviction hearing. However, in an offer of proof counsel indicated that the witness would state that she had not been able to identify defendant's car until it was pointed out by the detective and that he falsely told her that ballistic evidence showed that the car had been used in the murder.

The court also observed that the trial judge failed to draw an adverse inference from the detective's invocation of the Fifth Amendment when he was testified at the post-conviction hearing. Post-conviction proceedings are civil in nature. While the privilege against self-incrimination may be invoked at a civil proceeding, the trial court may draw an adverse inference that had questions been answered truthfully, the answers would have been damaging to the person invoking the privilege. While the court found that it need not decide whether an adverse inference was warranted in this case, the trial

court should have at least considered doing so where the detective failed to answer probative, detailed questions about his conduct in this case.

The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

# The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a prima facie case . . . . That has clearly occurred here.

3. The court also found that on remand, the cause should be assigned to a different judge:

Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for further proceedings.

#### $\S\S9-1(a), 9-1(g), 9-1(k),$

#### **People v. Serrano**, 2016 IL App (1st) 133493 (No. 1-13-3493, 6/7/16)

1. To obtain post-conviction relief due to actual innocence, the petitioner must present new, material, noncumulative evidence of such a conclusive character as to probably change the result on retrial. Whether evidence is conclusive depends on whether it places the trial evidence in such a different light as to undercut confidence in the factual correctness of the verdict. The post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the trial court grants a directed finding after the petitioner's case is presented at a third-stage evidentiary hearing, the decision is reviewed *de novo*. When presented with a motion for a directed finding, the trial court must construe the evidence in the light most favorable to the nonmovant.

2. Where the only direct evidence of the petitioner's guilt of murder was the testimony of a witness who repudiated his statement completely in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated by other witnesses, and there was no physical evidence connecting defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

Recantations of trial testimony are to be viewed with suspicion, but are not to be simply dismissed without further analysis. The court noted that there were reasons to be concerned about the veracity of the witness's testimony even at trial, as he was an admitted heroin addict, had a lengthy criminal history, and received a nine-year sentence for four felony cases on which he faced 100 years in prison. In addition, there was evidence that the witness had admitted years earlier that he had testified falsely, and the judge commented at trial that the witness's testimony was crucial for a conviction. Under these circumstances, the witness's affidavit recanting his trial testimony undeniably called critical evidence into question.

The recantation was significantly corroborated by testimony of another witness that he was coerced by the same detective to give false testimony against the defendant and that he received special treatment in prison after he implicated defendant and his co-defendant. The witness also testified that when he decided not to testify falsely, the detective took away his special privileges and again tried to solicit false testimony.

An additional witness, the decedent's wife, was not allowed to testify at the post-conviction hearing. However, in an offer of proof counsel indicated that the witness would state that she had not been able to identify the co-defendant's car until it was pointed out by the detective and that he falsely told her that ballistic evidence showed that the car had been used in the murder.

The court also observed that the trial judge failed to draw an adverse inference from the detective's invocation of the Fifth Amendment when he was testified at the post-conviction hearing. Post-conviction proceedings are civil in nature. While the privilege against self-incrimination may be invoked at a civil proceeding, the trial court may draw an adverse inference that had questions been answered truthfully, the answers would have been damaging to the person invoking the privilege. While the court found that it need not decide whether an adverse inference was warranted in this case, the trial court should have at least considered doing so where the detective failed to answer probative, detailed questions about his conduct in this case.

The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

# The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a prima facie case . . . . That has clearly occurred here.

3. The court also found that on remand, the cause should be assigned to a different judge:

Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for further proceedings.

#### §9-1(f)

# **People v. Al Momani**, 2016 IL App (4th) 150192 (No. 4-15-0192, 6/10/16)

The circuit court improperly granted the State's motion to dismiss defendant's post-conviction petition before defendant had notice and an opportunity to be heard. Defendant filed a *prose* post-conviction petition that was advanced to the second-stage, where counsel filed a supplemental petition. The State filed a motion to dismiss on February 10, 2015. Two days later, the circuit court granted the State's motion.

A fundamental requirement of due process is the opportunity to be heard in a meaningful manner. Here, the circuit deprived defendant of due process by granting the State's motion to dismiss without providing defendant notice and an opportunity to be heard. At the second stage of post-conviction proceedings, the court has no authority under the Act to rule on a motion to dismiss *ex parte* without giving the defendant notice. Since the Act does not specifically allow such action, the Appellate Court held that the Act requires notice and an opportunity to be heard prior to granting the State's motion to dismiss. This can be satisfied by having a hearing on the motion or allowing defendant to file a written response.

#### §9-1(f)

#### **People v. Jackson**, 2015 IL App (3d) 130575 (No. 3-13-0575, mod. op. 6/14/16)

1. Generally, the Post-Conviction Hearing Act contemplates that only one post-conviction petition will be filed. However, a successive petition may be filed where the trial court grants leave to do so. When leave to file a successive petition is granted, the petition is in effect advanced to the second stage of post-conviction proceedings.

At the second stage, the State has 30 days to answer or move to dismiss the petition. No further pleadings are permitted "except as the court may order on its own motion or on that of either party." 725 ILCS 5/122-5.

2. Post-conviction defense counsel may not argue against a client's interests by seeking dismissal of the post-conviction petition. If appointed counsel believes that a post-conviction petition is frivolous and patently without merit, he or she should file a motion to withdraw as counsel instead of asking that the petition be dismissed. If leave to withdraw is granted, the court may appoint new counsel or allow the defendant to

proceed *pro se*. It is improper to dismiss a post-conviction petition merely because post-conviction counsel has been allowed to withdraw.

3. Here, post-conviction defense counsel erred by filing a motion to dismiss the successive post-conviction petition. In addition, the motion could not be deemed to have been filed by the State where the prosecutor did not file any pleading, but merely acquiesced in defense counsel's motion. Furthermore, because §5/122-5 and precedent require that a motion to dismiss must be in writing, the prosecutor's oral statements would have been insufficient to qualify as a motion to dismiss.

Because post-conviction counsel's motion to dismiss was improper, the trial court's order dismissing the petition was reversed. The cause was remanded with instructions to allow defendant to proceed *pro se*.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

# $\S9-1(i)(1)$

**People v. Jenkins**, 2016 IL App (1st) 133286 (No. 1-13-3286, 6/21/16)

Under the Post-Conviction Hearing Act, a post-conviction proceeding may be commenced within a reasonable time after the defendant's conviction and only one petition may be filed without leave of the court. 725 ILCS 5/122-1(a-5), (f). The word "conviction" as used in the Act is a term of art meaning a final judgment that includes both a conviction and a sentence.

Following his conviction, defendant filed a post-conviction petition. The trial court granted the petition and the Appellate Court affirmed and remanded the case to the circuit court for resentencing. After defendant was resentenced, he filed another post-conviction petition in 2012 challenging the effective assistance of counsel at his original trial. The trial court denied defendant leave to file the 2012 petition.

The Appellate Court held that when a post-conviction petition leads to resentencing, a new petition filed after the resentencing should be considered an initial petition, not a successive petition. Here a new judgment was entered when defendant was resentenced. Defendant challenged that judgment for the first time when he filed his petition in 2012. Under the Act, defendant had a right to file a petition challenging the new judgment without first obtaining leave of the court.

The case was remanded for further post-conviction proceedings.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)

# $\S9-1(i)(1), 9-1(i)(2), 9-1(o)(2)$

**People v. Jones**, 2016 IL App (1st) 123371 (No. 1-12-3371, 6/30/16)

1. Leave to file a successive post-conviction petition should be granted only if the trial court determines that the petition states a colorable claim of actual innocence or establishes cause and prejudice. To establish a claim of actual innocence, the petitioner must show that the evidence in support of the claim is newly discovered, material and not merely cumulative, and of such a conclusive character as to probably change the result on retrial. Under the cause-and-prejudice test, the defendant must establish both cause for failing to raise the claim earlier and prejudice.

Because the standard for obtaining leave to file a successive petition is greater than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions, first-stage proceedings are unnecessary for subsequent petitions. If leave to file is granted, the successive petition is docketed for second-stage proceedings.

A petition is advanced from the second to third stage if it makes a substantial showing of a constitutional violation which would entitle the petitioner to relief if proven at a third-stage evidentiary hearing. Because second-stage proceedings would be superfluous if the same test was applied at the motion for leave to file and at the second stage, the substantial showing required at the second stage must be greater than the probability required to obtain leave to file a subsequent petition.

The court found that in deciding whether leave to file a successive petition should be granted, the court may consider the successive petition and the documentation presented by the petitioner. However, it is not proper for the court to review the trial record.

The court concluded that *de novo* review applies when reviewing whether the trial court properly denied leave to file a successive petition raising a claim of actual innocence or arguing cause and prejudice.

2. The court found that the petitioner should have been granted leave to file a successive petition based on a claim of actual innocence. First, the affidavit of an eyewitness was newly discovered where the affiant stated that he fled shortly after the offense because threats had been made on his life. In addition, because the petitioner's assertion that he was not at the scene of the offense must be taken as true for purposes of the motion for leave to file, the petitioner would not have known the identity of eyewitnesses who might have been able to exonerate him.

Second, where the petitioner claimed that officers had coerced him, evidence that the officers had been ordered to pay damages in a separate case for fabricating a confession was newly discovered where the verdict in the other case was not issued until after defendant's first post-conviction petition had been dismissed. Concerning this point, the court concluded that the trial court improperly rejected a letter from an assistant appellate defender and a newspaper article on the ground that such evidence would be

inadmissible. Because the Rules of Evidence do not apply in post-conviction proceedings, admissibility is not a factor in determining whether a subsequent petition can be filed.

In addition, the evidence was material and not merely cumulative. First, the affidavit of the only known eyewitness to the murder exonerated the petitioner and set forth details that were consistent in almost all respects with the trial record. Second, the information in the letter and newspaper article showed prior, similar misconduct by the officers involved in the confession and corroborated the claim of physical and psychological coercion. The court also noted that other than the petitioner's confession, there was no evidence to connect him to the offense.

Finally, the newly discovered evidence was of such conclusive character as to likely change the result on retrial. The court reiterated that the only evidence of defendant's involvement in the offense consisted of his allegedly coerced confession, and that the confession occurred under "odd" circumstances and did not match the physical evidence recovered at the scene. Under these circumstances, there was a likelihood of a different result when all of the newly discovered evidence was considered, including: (1) the affidavit of the eyewitness who stated that defendant was not at the crime scene; (2) the affidavit of the confessed shooter exonerating defendant; (3) the statements of two alibi witnesses discovered after the trial by the prosecutor and which stated that defendant was with the witnesses; and (4) information concerning similar misconduct by the same officers who obtained defendant's confession.

3. The trial court also erred by denying defendant leave to file a second post-conviction petition under the cause and prejudice test. A petitioner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during the initial post-conviction proceedings. Here, cause was shown because the letter from the assistant appellate defender and the newspaper article documenting the officers' misconduct were not available at the time of the first post-conviction petition.

Prejudice is shown by demonstrating that the claim not raised in the initial proceedings so infected the trial that the resulting conviction or sentence violated due process. Here, prejudice occurred because the new evidence showed misconduct by the same officers under similar circumstances.

The trial court's denial of leave to file a successive petition was reversed and the cause remanded for the appointment of new counsel.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

# $\S9-1(i)(1), 9-1(j)(1), 9-1(o)(2)$

**People v. Warren**, 2016 IL App (1st) 090884-C (No. 1-09-0884, 6/30/16)

1. In Miller v. Alabama, 567 U.S. \_\_\_\_, 132 S.Ct. 2455, \_\_\_\_ L.Ed.2d \_\_\_\_ (2012), the U.S. Supreme Court concluded that mandatory life sentences without the possibility of parole violate the Eight Amendment when imposed on offenders who are under the age of 18. In People v. Davis, 2014 IL 115595, the Illinois Supreme Court held that Miller applies retroactively to cases pending on collateral review at the time Miller was decided. Because defendant was 17 at the time of the offense and was required to be sentenced to natural life without the possibility of parole, and because his post-conviction appeal was pending when Miller was decided, resentencing was required.

The court concluded that defendant was not procedurally barred from raising the issue for the first time in an appeal from denial of a motion for leave to file a successive post-conviction petition. First, the "cause and prejudice" standard for successive petitions was satisfied because **Miller** was not available at the time of defendant's earlier post-conviction proceeding. In addition, a challenge to the constitutionality of a sentencing statute may be raised at any time.

2. The Appellate Court previously affirmed the trial court's denial of leave to file a successive post-conviction petition, but the Supreme Court denied leave to appeal and remanded the cause with instructions to vacate the judgment and reconsider the case in light of **Davis**. The Appellate Court concluded that it was authorized to reach not only the sentencing issue involved in **Davis**, but also to reconsider whether the trial court erred by denying leave to file a successive post-conviction petition. The court concluded that because it had vacated the prior judgment in accordance with the Supreme Court's direction, there would be no final judgment on the non-sentencing issues unless it also considered those issues.

The court rejected the argument that it was required to adhere to its previous holding on the non-sentencing issues although a majority of the Appellate Court no longer agreed with the earlier holding. Because the Supreme Court gave no specific directions concerning the non-sentencing issues and denial of leave to appeal cannot be interpreted as implicit approval of the lower court's opinion, the Appellate Court concluded that it was required to issue a new opinion on all the issues.

The court rejected the argument that the law of the case doctrine required it to adhere to its prior ruling. The law of the case doctrine applies only where there is a final judgment. Because the previous judgment had been vacated, there was no final judgment on the successive petition.

3. A motion for leave to file a successive petition based upon a claim of actual innocence should be denied only where it is clear from a review of the successive petition and the provided documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. Applying *de novo* review, the court concluded that

the evidence supporting defendant's claim was newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result at a retrial. Therefore, the defendant adequately pleaded an assertion of actual innocence to justify filing a successive petition.

In the course of its holding, the court acknowledged that affidavits provided by the petitioner were hearsay and that hearsay generally cannot be used to support post-conviction claims. The Supreme Court has held that this rule should not be applied inflexibly, however. Where the affidavits contained facts material to defendant's innocence and alleged that two persons who had confessed to the offense were hostile or unavailable to the petitioner, the court elected to consider the affidavits. The court also noted that the affidavits might be admissible at trial under various hearsay exceptions.

In a concurring opinion, Justice Gordon stated that because the Illinois Rules of Evidence have been amended and do not now apply to post-conviction hearings, the fact that supporting affidavits contain hearsay should not be considered in determining whether leave to file a subsequent petition should be granted.

4. The court concluded that the affidavits qualified as "newly discovered evidence" although defense counsel at defendant's first post-conviction proceeding was aware of the affiants and their willingness to testify. The court noted that the attorney retained by defendant for the first post-conviction petition explained during proceedings on that petition that he did not obtain affidavits because the statute of limitations was expiring. However, counsel did not explain why he failed to amend the petitions and supply the affidavits during the four-year period between the filing of the petition and the hearing on the State's motion to dismiss. In addition, defendant was rebuffed in his effort to obtain new counsel in the first proceeding, and once he was represented by counsel could not present the evidence himself. Under these circumstances, the evidence should be considered to be newly discovered.

The court noted that its holding was confined to the unique instance where defendant retains counsel for the first post-conviction proceeding but that attorney fails to provide reasonable assistance by presenting exculpatory evidence.

The trial court's denial of the motion for leave to file a subsequent post-conviction petition was reversed and the cause remanded for further proceeding.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

#### $\S9-1(i)(2)$

#### **People v. Sanders**, 2016 IL App (1st) 121732-B (No. 1-12-1732, 6/28/16)

- 1. A defendant may file a successive petition if he can show cause and prejudice. 725 ILCS 5/122-1(f). To establish cause and prejudice, a defendant must show that an objective impediment precluded him from raising the issue in an earlier proceeding and that the claimed errors resulted in actual prejudice.
- 2. A jury convicted defendant, who was 17 at the time of the offense, of murder and two counts of attempt murder. The trial court sentenced defendant to consecutive terms of 40 years for murder and 30 years for each count of attempt murder, for a total of 100 years imprisonment. In sentencing defendant, the court stated that it could sentence him to natural life, "but because of your young age" and potential for rehabilitation "I am not going to do that." But the court stated that it would impose a sufficiently long sentence so that society would not need to worry about defendant committing similar crimes in the future.

Defendant eventually filed a second successive postconviction petition arguing that the trial court did not properly consider his youth in imposing sentence, and that the recent case of **Graham v. Florida**, 560 U.S. 48 (2010) changed the law applicable to juvenile sentencing providing cause for his failure to raise the issue earlier. The trial court denied leave to file.

3. The Appellate Court held that the trial court violated the Eighth Amendment by imposing a *de facto* life sentence without considering the special circumstances of defendant's youth. And the Supreme Court decisions in **Graham** and **Miller v. Alabama**, 567 U.S. \_\_\_\_ (2012), substantially changed the law concerning juvenile sentencing thus providing cause and prejudice for filing a successive petition.

The Appellate Court noted that defendant would need to serve at least 49 years of his 100 year sentence before he would be eligible for parole. A prisoner has a life expectancy of only 64 years, meaning defendant would be effectively imprisoned for the rest of his life. But the trial court did not consider the special circumstances of youth in imposing sentence. The Appellate Court reversed the denial of defendant's successive petition and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

#### COUNSEL

#### §13-1(d)

**People v. Hunt**, 2016 IL App (1st) 132979 (No. 1-13-2979, 6/17/16)

1. As a general rule, a criminal defendant has a constitutional right to represent himself if he makes an unequivocal request to do so. To invoke the right of self-representation, the defendant must knowingly, intelligently, and unequivocally waive counsel and seek to proceed *pro se*. Courts must indulge every reasonable presumption against finding waiver of the right to counsel. To determine the voluntariness of a waiver, a reviewing court will examine the overall context of the proceeding, including defendant's conduct after the request for self-representation.

The right to self-representation is not absolute, however, and may be forfeited if the defendant engages in serious and obstructionist misconduct or cannot make a knowing and intelligent waiver of counsel. A request to proceed *pro se* may also be rejected where it comes so late in the proceedings that self-representation would disrupt the orderly schedule of proceedings or where the defendant engages in serious and obstructionist misconduct. On the other hand, a request to proceed *pro se* that is not accompanied by a request for additional time to prepare should be regarded as timely.

On review, the trial court's decision on the defendant's election to represent himself will be reversed only if the trial court abused its discretion. An abuse of discretion occurs when the lower court's ruling is arbitrary and without a logical basis.

2. Defendant unequivocally expressed a desire to represent himself on two occasions, first before a substitute judge and again before the trial judge who heard the trial. The trial judge refused to allow self-representation on the basis that the request was a tactic to delay the trial.

Because defendant twice unequivocally requested to represent himself and did not ask for more time or engage in any obstructionist conduct, the trial court abused its discretion by denying the request. The court also found that where there had been six continuances - five by agreement and one on the court's own motion - the record did not support the finding that the request was made for purposes of delay.

Furthermore, defendant did not act as an obstructionist. Despite the trial court's belief that defendant engaged in humor and gamesmanship, the record shows that defendant acted appropriately and seriously.

3. The court rejected the State's argument that the defendant's request for self-representation could be denied because it was made on the day the matter was set for a jury trial. Although the cause was set for trial, there were two outstanding pretrial motions which needed to be addressed. Furthermore, the trial was continued several more times and did not start until six months later.

The court also rejected the State's argument that defendant acquiesced to trial counsel's representation because he neither renewed his request to proceed *pro se* nor complained about the public defender's representation. A defendant need not make repeated futile attempts to represent himself. Once the trial court denied self-representation as an attempt to delay the trial, additional requests would have been pointless.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

# **§13-2 People v. Henry**, 2016 IL App (1st) 150640 (No. 1-15-0640, 6/30/16)

At his trial for first-degree murder, aggravated battery with a firearm, and unlawful use of a weapon, defendant failed to return to court when the proceedings ended on the first day. Bond was revoked and a warrant was issued for defendant's arrest. The trial continued, and defendant was convicted and sentenced *in absentia*.

Defendant was arrested some three years later, and began to serve the sentence that had been imposed *in absentia*. He then filed a post-conviction petition arguing that trial counsel had been ineffective for failing to investigate and call alibi witnesses at trial.

The State argued that by absenting himself from trial, defendant "chose to forego" his alibi defense. The court rejected this argument, noting that defendant's voluntary absence from trial may waive the rights to be present and confront witnesses but does not waive the right to the effective assistance of counsel. The court noted that under Supreme Court Rule 401, a defendant charged with an offense punishable by imprisonment may waive counsel only in open court and only after being properly admonished by the trial court of the consequences of a waiver. Because there was no such waiver in the record, defendant's flight did not waive his right to the effective assistance of counsel.

However, the court went on to find that defense counsel was not ineffective.

(Defendant was represented by Assistant Defender Roxanna Mason, Chicago.)

# $\S13-5(d)(3)(a)(1), 13-5(d)(3)(a)(2)$

**People v. Downs**, 2016 IL App (2d) 121156-B (No. 2-12-1156, 6/30/16)

After the verdict at his trial for first degree murder but before sentencing, defendant filed two *pro se* motions alleging that trial counsel had provided ineffective assistance of counsel. The trial court did not conduct a preliminary **Krankel** inquiry, but did appoint counsel who filed an amended motion raising five of defendant's 34 allegations. Defendant then filed a third *pro se* motion raising 13 additional claims of ineffective assistance.

The trial court then vacated its appointment of counsel and held a hearing at which defendant stated each issue, trial counsel and the prosecutor responded, and defendant was given a chance for rebuttal. The trial court then ruled that there was no need to continue the hearing or appoint counsel, and "[e]ffectively" dismissed defendant's claims.

On appeal, the Appellate Court determined that the trial court had improperly converted the preliminary inquiry into an adversarial hearing at which defendant was not represented. The cause was remanded for the appointment of counsel and further proceedings.

On remand, the court appointed the same attorney to represent defendant. Counsel filed a third amended **Krankel** motion which raised only a general allegation of ineffective assistance without asserting any specific acts by trial counsel or any prejudice. Counsel stated that he had consulted with defendant to ascertain his allegations of ineffectiveness, but when defendant stated that he had not met with counsel the latter stated that he had reviewed the transcript of the first hearing.

The trial court denied the third amended motion, stating that it failed to allege any specific acts of deficient performance or prejudice. The Appellate Court reversed a second time, finding that defense counsel failed to assert nonfrivolous allegations of trial counsel's ineffectiveness.

1. When determining whether **Krankel** counsel was ineffective, the standard of **Strickland v. Washington** is applied. Thus, defendant must show that counsel's representation was deficient and that prejudice resulted.

The court concluded that counsel appointed after a preliminary **Krankel** claim has been conducted is obligated to present defendant's non-frivolous claims to the trial court. The court also stressed that there is a distinction between a frivolous claim and a claim that is not frivolous but which is likely to be unsuccessful. A non-frivolous claim is one which has at least an arguable basis in law or fact.

The court concluded that **Krankel** counsel did not provide adequate "representation" where he failed to present all non-frivolous claims, apparently because he believed that he had an ethical duty not to present claims which he believed "don't make sense and don't meet standards."

2. The Appellate Court also stressed that **Krankel** counsel must consult with the defendant to determine the grounds for defendant's claims of ineffectiveness. The court criticized counsel for evaluating the strength of defendant's claims based on the transcript of an earlier **Krankel** hearing which involved procedures previously determined by the Appellate Court to be improper. By basing his analysis on the faulty hearing, counsel "would inevitably determine that all of defendant's claims were going to fail, because they had already been presented once to the trial court which rejected them."

Because counsel appointed on defendant's **Krankel** claims abdicated his responsibility to present non-frivolous claims of ineffective assistance of counsel, the lower court's denial of defendant's **Krankel** motion was vacated and the cause remanded for a second-stage **Krankel** hearing. The court also directed the trial judge to appoint different counsel to represent defendant and ordered that the new attorney be allowed to investigate defendant's claims and present any non-frivolous claims supported by the record or such investigation.

(Defendant is represented by Assistant Defender Bruck Kirkham, Elgin.)

#### $\S13-5(d)(3)(a)(1)$

**People v. Shamhart**, 2016 IL App (5th) 130589 (No. 5-13-0589, 6/13/16)

1. After being convicted but prior to sentencing, defendant filed a letter and a *pro se* motion for a new trial making several detailed allegations of ineffective assistance of trial counsel. The trial court allowed defense counsel to withdraw and appointed new counsel to represent defendant for post-trial motions and sentencing.

At the hearing on post-trial motions, defendant's new counsel asked to call defendant as a witness in support of the claims of ineffective assistance. The State objected to counsel's request, arguing that defendant's claims were "extraneous to the record," and were not a matter for post-trial motions. The court denied counsel's request to allow defendant to testify and said it would take judicial notice of defendant's filings. Following argument, the court denied defendant's post-trial motions.

- 2. The Appellate Court held that the trial court improperly refused to allow defendant to present evidence in support of his claim of ineffective assistance. Defendant raised several claims of ineffectiveness with some support in the record for his claims. Even if these claims were ultimately without merit, defendant should have had the chance to specify and support his claims at an evidentiary hearing.
- 3. The Appellate Court rejected the State's argument that because the trial court took judicial notice of the documents defendant filed in support of his allegations, there was no need for an evidentiary hearing. Under the Illinois Rules of Evidence, judicial

notice only applies to facts that are not subject to reasonable dispute. Ill. R. Evid. 201. Here, the documents filed by defendant raised a multitude of issues, and the court did not believe "the State would stand idly by and have no response" to defendant's claims, thereby conceding those claims. The factual allegations were thus not proper subjects for judicial notice.

The cause was remanded for an evidentiary hearing on defendant's post-trial claims.

(Defendant was represented by Assistant Defender Richard Whitney, Mt. Vernon.)

#### DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

**§16-2** 

**People v. Maxey**, 2016 IL App (1st) 130698 (No. 1-13-0698, 6/30/16)

Fleeing or attempting to elude a peace officer occurs when a driver willfully fails or refuses to obey a police officer's visual or audible signal to bring his vehicle to a stop, provided that the officer is in police uniform. 625 ILCS 5/11-204(a).

Here the State failed to produce any evidence that the officer was in police uniform and thus failed to establish an essential element of the offense. The court reversed defendant's conviction for aggravated fleeing or attempting to elude a peace officer.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

#### **EVIDENCE**

§19-8(d)

**People v. Gibbs**, 2016 IL App (1st) 140785 (No. 1-14-0785, 6/1/16)

Where the defendant raises self-defense, evidence of the complainant's violent character is relevant to show which party was the aggressor. **People v. Lynch**, 104 Ill.2d 194, 470 N.E.2d 1018 (1984). Such "**Lynch** evidence" may consist of the complainant's previous arrests or convictions for violent crimes.

Where the trial court allowed a stipulation that the complainant had a 14-year-old conviction for domestic violence, the court did not err by refusing to allow the defense to also question the complainant about the conviction. **Lynch** does not require live testimony concerning the complainant's prior conviction, which is "persuasive proof"

of the complainant's conduct. By contrast, where the **Lynch** evidence consists of arrests or altercations for which there was no conviction, live testimony is appropriate because the evidence does not indicate whether the individual actually engaged in the alleged conduct.

The court observed that the trial court could have exercised its discretion to allow limited questioning of the complainant about the prior conviction, but did not abuse its discretion by refusing to do so.

# §19-8(d)

**People v. Yeoman**, 2016 IL App (3d) 140324 (No. 3-14-0324, 6/17/16)

Where the defendant raises a theory of self-defense, evidence of the victim's aggressive and violent character is relevant for two distinct purposes. First, the evidence is relevant to show the defendant's knowledge of the victim's violent tendencies and that such knowledge affected the defendant's perception of and reaction to the victim's behavior. Second, where there are conflicting accounts of the offense, evidence of the victim's aggressive and violent character is relevant to support defendant's claim that the victim was the aggressor, whether or not defendant had previous knowledge of the victim's propensity for violence.

Where defendant raised self-defense at his trial for second-degree murder of a person who engaged in road rage after defendant honked at him when he sat at a green light, the trial judge did not err by excluding evidence that in a prior road-rage incident, the decedent approached a car and yelled at the driver. Because yelling and disorderly conduct do not constitute violence, the evidence did not show aggressive and violent behavior.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

#### §19-22(c)

**People v. Shamhart**, 2016 IL App (5th) 130589 (No. 5-13-0589, 6/13/16)

Defendant raised several claims of ineffective assistance of his trial counsel in documents filed after he was convicted. The court appointed new counsel to represent defendant but would not allow defendant to testify at an evidentiary hearing in support of his claims. Instead, the court said it would take judicial notice of defendant's filings.

In finding that the trial court improperly denied defendant the opportunity to present evidence in support of his claims, the Appellate Court rejected the State's argument that there was no need for an evidentiary hearing because the trial court took judicial notice of the defendant's filings.

Under the Illinois Rules of Evidence, judicial notice only applies to facts that are not subject to reasonable dispute. Ill. R. Evid. 201. Here, the documents filed by defendant raised a multitude of issues, and the court did not believe "the State would stand idly by and have no response" to defendant's claims, thereby conceding those claims. The factual allegations were thus not proper subjects for judicial notice.

The cause was remanded for an evidentiary hearing on defendant's post-trial claims.

(Defendant was represented by Assistant Defender Richard Whitney, Mt. Vernon.)

#### **GUILTY PLEAS**

#### **§24-1**

**People v. Williams**, 2016 IL App (1st) 133812 (No. 1-13-3812, 6/17/16)

Generally it is left to the trial court's sound discretion whether to allow a defendant to withdraw his guilty plea. A trial court may set aside a guilty plea on its own motion without defendant's consent when it has good reason to doubt the truth of the plea.

Defendant pled guilty pursuant to a negotiated plea agreement with the State. The trial court accepted defendant's plea and sentenced him in accordance with the plea agreement. When asked if he had any questions, defendant complained about the length of his negotiated sentence, but never asked to withdraw his plea. He instead insisted on keeping the plea agreement no matter how unhappy he was with the sentence. The trial court recessed the case to give defendant time to think it over.

When the case was reconvened, the trial court directed the parties to proceed to trial without ever vacating the guilty plea. Following a bench trial, the court convicted defendant of more offenses and imposed a higher sentence.

The Appellate Court reinstated defendant's negotiated plea agreement. Defendant never asked to withdraw his plea and there was no formal decision by the trial court to vacate the plea. Instead, the trial court and the parties proceeded on the mistaken recollection that the guilty plea had not been taken. Moreover, no one ever called into question the truth of the plea, and thus the trial court had no basis for setting aside the plea on its own motion.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

# §24-8(b)(2)

**People v. Hagerstrom**, 2016 IL App (3d) 140559 (No. 3-14-0559, 6/28/16)

Following a remand for compliance with Illinois Supreme Court Rule 604(d), defense counsel again failed to comply with the rule. Instead of stating that he had consulted with defendant to ascertain his contentions of error in the sentence and entry of the guilty plea, as required by Rule 604(d)(1), counsel merely stated that he had consulted with defendant about his contentions of error in the entry of the sentence. And instead of stating that he had examined the trial court file and both the report of proceedings of the guilty plea and the sentencing hearing, as required by Rule 604(d)(2), counsel merely stated that he had examined the trial court file.

The State agreed that counsel failed to comply with Rule 604(d), but argued that a second remand was not necessary under **People v. Shirley**, 181 Ill.2d 359 (1998). The court rejected this argument. It noted that although the **Shirley** court stated that it saw "limited value" in requiring multiple remands, it explicitly premised its decision on its finding that defendant had a full and fair hearing following the initial remand. **Shirley** thus did not create a bar on successive remands when they were appropriate. In the present case, by contrast with **Shirley**, counsel had not come close to complying with Rule 604(d). The court remanded for further post-plea proceedings.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

#### **HOMICIDE**

#### §26-4(a)

**People v. Yeoman**, 2016 IL App (3d) 140324 (No. 3-14-0324, 6/17/16)

One element of second-degree murder under a knowing murder theory is that defendant knew his acts created a strong probability of death or great bodily harm to the decedent. To act with a "knowing" mental state, the defendant must possess a conscious awareness that his conduct is practically certain to cause the result in question.

There is a general rule in Illinois law that death is not ordinarily contemplated as a natural consequence of a blow or blows from a bare fist, unless there is a great disparity in size and strength between the defendant and the victim. The court concluded that the evidence was insufficient to establish that defendant knew that his acts created a strong probability of death or great bodily harm where after a road-rage incident, defendant struck the decedent one time in the face with his bare fist. The decedent hit his head on the pavement and subsequently died.

The court concluded that striking a person of approximately equal size one time in the face with a bare fist is not the type of conduct that would create a strong probability of death or great bodily harm. Under these circumstances, defendant could not have known that death or great bodily harm was practically certain to occur. The Appellate Court reversed the conviction for second degree murder.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

#### INDICTMENTS, INFORMATIONS, COMPLAINTS

#### **§29-3**

**People v. Daniels**, 2016 IL App (1st) 142130 (No. 1-14-2130, 6/20/16)

- 1. A nolle prosequi is the formal entry by the State declaring that it is unwilling to prosecute certain charges. It terminates those charges against the defendant and leaves the matter as it was before charges were filed. A nolle prosequi is not a final disposition of the case and will not bar another prosecution for the same offense. But where the State "causes the entrance of an unconditional nolle prosequi," the proceeding is terminated and the same indictment cannot be reinstated at a subsequent term. The State may only reinstate a nolled charge by asking the trial court to vacate the nolle order before jeopardy attaches. Alternatively, the State may file a new charge to initiate separate proceedings against a defendant.
- 2. The State charged defendant with multiple counts of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon. As part of negotiated guilty plea, the State *nolled* all the charges except one count of AUUW and defendant pled guilty to that count. After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.
- 3. On appeal, the State conceded that defendant's conviction should be vacated but asked the Appellate Court to remand the case to the trial court to reinstate six of the *nolled* charges. The Appellate Court vacated defendant's conviction but denied the State's request to reinstate the charges.

The court first noted that the State never asked the trial court to reinstate the charges nor did it file new charges to initiate a separate proceeding. The appeal related solely to the dismissal of defendant's 2-1401 petition, which was an altogether new proceeding, not a continuation of defendant's criminal case. That case ended when defendant pled guilty. The Appellate Court thus lacked jurisdiction to address issues related to the *nolled* counts.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

#### **JUDGE**

§31-1(a)				
Williams v. Pennsylvania, _	U. S	, S.Ct,	L.Ed.2d	_ (2016) (No
15-5040, 6/9/16)				

1. Due process guarantees that the judge is not actually biased, and requires recusal when the likelihood of bias is "too high to be constitutionally tolerable." Whether due process is violated where a judge refuses to recuse himself depends on whether an average judge in the same position would be likely to remain neutral.

The court concluded that there is an unacceptable risk of actual bias where a judge had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case, because of the potential for bias where a single person serves as both accuser and adjudicator in the same case.

2. Where during trial the district attorney personally approved his assistant's request to seek a death sentence against the defendant, due process was violated thirty years later when, as Chief Justice of the Pennsylvania Supreme Court, the former district attorney participated in the court's decision to reinstate the death sentence and vacate a lower court's decision granting post-conviction relief based on a **Brady** violation. Before participating in the decision, the former district attorney denied defendant's request that he recuse himself.

The Supreme Court stated: "When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." The court added that the personal knowledge which the judge acquired as an advocate for the prosecution "may carry far more weight with the judge than the parties' arguments to the court."

The court found that the decision to seek a death sentence amounted to significant, personal involvement in a critical trial decision, because without the prosecutor's express authorization the State would not have been able to pursue a death sentence. The court also noted that the relief ordered by the lower court was based on repeated, intentional **Brady** violations. Even if the former district attorney had not been aware of the violations at the time of defendant's trial, it would be difficult for a judge in his position not to view the [post-conviction] court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney."

3. The court also stressed that the due process clause marks only the "outer boundaries of judicial disqualification," and that ethical rules in many jurisdictions would have required the judge to recuse himself under these circumstances.

- 4. A due process violation based on a judge's failure to recuse himself does not amount to harmless error even if the jurist's vote was not decisive on a multimember court. The deliberations of an appellate panel are confidential, and it is not possible to determine whether a particular jurist's position may have influenced the views of his or her colleagues. In addition, due process guarantees an opportunity to present one's claims to a court which is not burdened by any temptation to be affected by the fact that a member of the court participated in the case as a prosecutor.
- 4. In a dissenting opinion, Chief Justice Roberts and Justice Alito stated that although they did not believe that due process required the judge to recuse himself, "[t]hat does not mean . . . that it was appropriate" for the judge to participate in the case. The dissenters noted State court decisions and ethic opinions that would prohibit a prosecutor from serving as judge in a case which he previously prosecuted, and found that it was up to State authorities to determine whether recusal should have been required.

#### **JURY**

§32-8(a)

**People v. Coan**, 2016 IL App (2d) 151036 (No. 2-15-1036, 6/29/16)

Under the invited-error doctrine, a defendant may not request to proceed in one manner at trial and later argue on appeal that error occurred. To permit a defendant to use the exact ruling or action that he procured at trial as a means of reversal on appeal would offend notions of fair play and encourage duplicitous behavior. Even plain-error review is forfeited when a defendant invites the error.

Here defendant failed to object to an incorrect jury instruction tendered by the State. The court rejected the State's attempt to portray this as invited error. The State, not defendant, tendered the instruction, and the failure to object did not mean that defendant agreed on the record to using the instruction. In this circumstance, the issue should be reviewed under the plain error doctrine.

§32-8(a)

**People v. Lindsey**, 2016 IL App (1st) 141067 (No. 1-14-1067, 6/14/16)

Theft of property not exceeding \$500 is a Class A misdemeanor. 720 ILCS 5/16-1(b)(1). Theft is elevated to a Class 4 felony if it is committed in a place of worship. 720 ILCS 5/16-1(a)(1)(A). A place of worship is a "church, synagogue, mosque, temple, or other

building...used primarily for religious worship and includes the grounds of a place of worship." 720 ILCS 5/2-15b.

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Although **Apprendi** errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that **Apprendi** errors have been found harmless only where the evidence was "uncontested and overwhelming," but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant's conviction to a Class A misdemeanor.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

# **§32-8(a) People v. Robinson**, 2016 IL App (1st) 130484 (No. 1-13-0484, 6/17/16)

An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. 720 ILCS 5/10-1(a)(3). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. 720 ILCS 5/10-1(a)(1).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

The court reversed the aggravated kidnapping conviction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

#### **JUVENILE**

**§33-3** 

People v. Patterson, 2016 IL App (1st) 101573-B (No. 1-10-1573, 6/21/16)

Under 5 ILCS 70/4, where the legislature does not provide a specific provision concerning the retroactive or prospective application of amendatory acts, procedural amendments are to be applied retroactively while substantive amendments are applied prospectively. Where the Juvenile Court Act was amended during the respondent's appeal to increase the minimum age for mandatory transfer from 15 to 16, the legislation did not provide whether the provision was to be applied retroactively, and defendant had been 15 at the time of the offense, the court concluded that the change in age for mandatory transfer constituted a procedural change that was to be applied retroactively to cases on direct appeal.

However, the court also found that the cause should be remanded to allow the State an opportunity to file a motion seeking a discretionary transfer of the respondent's case to criminal court. Although the State failed to file such a motion at the time of the original proceeding, the law at that time provided for an automatic transfer, making a motion for discretionary transfer unnecessary. Because the automatic transfer provision no longer applied to the respondent, the State should be allowed an opportunity to seek discretionary transfer.

The cause was remanded to permit the State to file a motion for discretionary transfer if it wished to do so, and for a transfer hearing if such a motion was filed.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

#### §33-6(a)

# **People v. Sanders**, 2016 IL App (1st) 121732-B (No. 1-12-1732, 6/28/16)

- 1. A defendant may file a successive petition if he can show cause and prejudice. 725 ILCS 5/122-1(f). To establish cause and prejudice, a defendant must show that an objective impediment precluded him from raising the issue in an earlier proceeding and that the claimed errors resulted in actual prejudice.
- 2. A jury convicted defendant, who was 17 at the time of the offense, of murder and two counts of attempt murder. The trial court sentenced defendant to consecutive terms of 40 years for murder and 30 years for each count of attempt murder, for a total of 100 years imprisonment. In sentencing defendant, the court stated that it could sentence him to natural life, "but because of your young age" and potential for rehabilitation "I am not going to do that." But the court stated that it would impose a sufficiently long sentence so that society would not need to worry about defendant committing similar crimes in the future.

Defendant eventually filed a second successive postconviction petition arguing that the trial court did not properly consider his youth in imposing sentence, and that the recent case of **Graham v. Florida**, 560 U.S. 48 (2010) changed the law applicable to juvenile sentencing providing cause for his failure to raise the issue earlier. The trial court denied leave to file.

3. The Appellate Court held that the trial court violated the Eighth Amendment by imposing a de facto life sentence without considering the special circumstances of defendant's youth. And the Supreme Court decisions in **Graham** and **Miller v. Alabama**, 567 U.S. \_\_\_\_ (2012), substantially changed the law concerning juvenile sentencing thus providing cause and prejudice for filing a successive petition.

The Appellate Court noted that defendant would need to serve at least 49 years of his 100 year sentence before he would be eligible for parole. A prisoner has a life expectancy of only 64 years, meaning defendant would be effectively imprisoned for the rest of his life. But the trial court did not consider the special circumstances of youth in imposing sentence. The Appellate Court reversed the denial of defendant's successive petition and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

#### §33-6(b)

In re Justin F., 2016 IL App (1st) 153257 (No. 1-15-3257, 6/7/16)

705 ILCS 405/5-750(1) provides that before committing a delinquent to the Department of Juvenile Justice, the trial court must make certain findings and consider several individualized factors. The court held that in this case, the record failed to show that the court considered one of the individualized factors - the availability of services within the Department of Juvenile Justice that will meet the individualized needs of the minor. 705 ILCS 405/5-750(1)(b)(G). Because there was no testimony or any written report in the record addressing this issue, the trial court erred by committing the minor to the Department of Juvenile Justice. The commitment order was vacated and the cause remanded for further proceedings.

(Minor was represented by Assistant Defender Kadi Weck, Chicago.)

#### KIDNAPPING, UNLAWFUL RESTRAINT AND RELATED OFFENSES

**§34-1** 

**People v. Robinson**, 2016 IL App (1st) 130484 (No. 1-13-0484, 6/17/16)

An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. 720 ILCS 5/10-1(a)(3). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. 720 ILCS 5/10-1(a)(1).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

The court reversed the aggravated kidnapping conviction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

#### NARCOTICS (CONTROLLED SUBSTANCES; CANNABIS)

§35-3(a)

**People v. Davis**, 2016 IL App (1st) 142414 (No. 1-14-2414, 6/17/16)

The State failed to prove that the delivery of controlled substances occurred within 1000 feet of a school. 720 ILCS 570/407(b)(2). The evidence showed that defendant sold heroin to an undercover officer at an alley behind a gas station. The parties stipulated that an investigator measured the distance from the gas station to a high school as 822 feet. There was no evidence as to precisely where in the alley the sale took place or where in the gas station the investigator made his measurement from.

The court held that in order to establish that a drug transaction took place within 1000 feet of a school, the State must present evidence of the distance from the actual site of the transaction to the school. Here the evidence failed to show where precisely the transaction took place in the alley. And there was no evidence where precisely in the gas station the technician took his measurements. The State thus did not meet its burden.

Although the investigator's evidence was presented by stipulation, that did not remedy the shortcomings in the proof. Stipulations are given their natural probative effect and do not include matters that are not necessarily implicated by the stipulation. Here the stipulation only showed that the measurement took place from some point in the gas station and did not show that the measurement was from the actual site of the transaction in the alley behind the station.

The court reduced the conviction to delivery of a controlled substance and remanded for resentencing.

#### REASONABLE DOUBT

**§42-1** 

People v. Davis, 2016 IL App (1st) 142414 (No. 1-14-2414, 6/17/16)

The State failed to prove that the delivery of controlled substances occurred within 1000 feet of a school. 720 ILCS 570/407(b)(2). The evidence showed that defendant sold heroin to an undercover officer at an alley behind a gas station. The parties stipulated that an investigator measured the distance from the gas station to a high school as 822 feet. There was no evidence as to precisely where in the alley the sale took place or where in the gas station the investigator made his measurement from.

The court held that in order to establish that a drug transaction took place within 1000 feet of a school, the State must present evidence of the distance from the actual site of the transaction to the school. Here the evidence failed to show where precisely the transaction took place in the alley. And there was no evidence where precisely in the gas station the technician took his measurements. The State thus did not meet its burden.

Although the investigator's evidence was presented by stipulation, that did not remedy the shortcomings in the proof. Stipulations are given their natural probative effect and do not include matters that are not necessarily implicated by the stipulation. Here the stipulation only showed that the measurement took place from some point in the gas station and did not show that the measurement was from the actual site of the transaction in the alley behind the station.

The court reduced the conviction to delivery of a controlled substance and remanded for resentencing.

#### SEARCH AND SEIZURE

**§§44-1(c)(1), 44-18**Utah v. Strieff, \_\_\_ U. S. \_\_\_, \_\_ S.Ct. \_\_\_, \_\_ L.Ed. \_\_\_ (2016) (14-1373, 6/20/16)

1. The Fourth Amendment exclusionary rule requires that courts exclude both primary evidence obtained as a direct result of an illegal search and any evidence subsequently discovered as a result of the illegal search. However, due to the significant cost of the exclusionary rule, the U.S. Supreme Court has limited its applicability to instances where the deterrent effect outweighs the substantial social cost.

Thus, several exceptions to the exclusionary rule are recognized, including the attenuation doctrine. This doctrine holds that evidence obtained as a result of a Fourth Amendment violation is admissible where the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance such that the interests protected by the Fourth Amendment would not be served by suppressing the evidence.

2. The court concluded that the attenuation doctrine examines the "causal link" between the government's unlawful act and the discovery of the evidence, and does not require an independent, voluntary act of the defendant (such as a confession leading to the discovery of evidence or consent to a search). Thus, the Utah Supreme Court erred by finding that the attenuation doctrine applies only where the intervening event between an unlawful arrest and the recovery of evidence consists of a voluntary act by the arrestee.

- 3. Whether the discovery of evidence is sufficiently attenuated from the constitutional violation is determined by the three factors articulated in **Brown v. Illinois**, 422 U. S. 590 (1975): (1) the "temporal proximity" between the unconstitutional conduct and the discovery of evidence, (2) the presence of any intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Of these factors, the third is the most important.
- 4. Here, the discovery of evidence on defendant's person was sufficiently attenuated from the unconstitutional stop to preclude application of the exclusionary rule.

During intermittent surveillance over one week, an officer who was investigating a tip concerning narcotics activity observed that several visitors left a particular residence within a few minutes after arriving. The officer observed defendant leave the house and go toward a nearby convenience store. Although he did not suspect any wrongdoing by defendant, the officer detained defendant, identified himself, and asked what defendant was doing at the residence.

As part of the stop, the officer requested defendant's identification. The officer relayed the information to a police dispatcher, who reported that defendant had an outstanding arrest warrant for a traffic violation. The officer arrested defendant pursuant to the warrant, and performed a search incident to arrest which disclosed a bag of methamphetamine and drug paraphernalia.

Throughout the proceedings, the prosecution conceded that the officer lacked reasonable suspicion for the stop. The prosecution argued, however, that the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband. The Supreme Court agreed.

The court concluded that the only the first **Brown** factor favored suppression, because substantial time did not elapse between the illegal detention and the discovery of the contraband. The court concluded that the second factor favored the State, however, because the arrest warrant was valid, predated the unconstitutional stop, was unconnected to the stop, and required the officer to make an arrest.

The court concluded that the third factor - the purpose and flagrancy of the officer's misconduct - also favored the State. The purpose of the exclusionary rule is to deter police misconduct. The court found that the officer here was "at most negligent," because he made "two good-faith mistakes" by stopping defendant "without a sufficient basis to suspect" that he was a short-term visitor who was consummating a drug transaction and by detaining defendant instead of merely asking to speak to him. "[T]hese errors in judgment hardly rise to a purposeful or flagrant violation of [defendant's] Fourth Amendment rights."

The court also stressed that there was no indication the stop was made as part of a systematic pattern of misconduct, the officer's conduct was lawful after the decision to make an improper stop, the warrant check was a precaution to assure officer safety,

and the contraband was discovered as part of a lawful search incident to arrest. Under these circumstances, the outstanding warrant was a critical intervening circumstance which was independent of the illegal stop and which broke the causal connection between the illegal stop and the discovery of the evidence.

In the course of its holding, the court rejected the argument that conducting a suspicionless stop constitutes flagrant misconduct. The court found that police action can be "flagrant" only if it is "more severe" than merely making an unjustified stop.

- 5. Because the State did not attempt to justify the stop, the court assumed for purposes of the opinion that the officer lacked any reasonable suspicion to make the initial stop. The court also stated that in light of its conclusion that the attenuation doctrine applied, it need not decide whether the existence of an outstanding warrant made the initial stop constitutional "even if the [the officer] was unaware of [the warrant's] existence."
- 6. In dissent, Justices Sotomayor and Ginsberg noted that in many areas a substantial part of the population has outstanding arrest warrants. Thus, the possible existence of an arrest warrant is not the sort of "intervening surprise" that an officer cannot anticipate when making a stop.

The dissenting opinion also described the majority opinion as setting forth the "remarkable proposition" that the mere existence of a warrant not only gives an officer legal cause to arrest and search a person, but also "forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch."

7. In a separate dissent, Justice Kagan stated that "given the staggering number of such warrants on the books," the majority opinion provides police with an incentive to make illegal stops because if the detainee turns out to have an outstanding warrant, anything found in a search may be used in a criminal prosecution.

# **§44-5(a) People v. Reynolds**, 2016 IL App (4th) 150572 (No. 4-15-0572, 6/10/16)

1. At common law, municipal and county police officers lacked authority to make arrests outside the territorial limits of the political subdivision that appointed them to their office, unless they were in fresh pursuit of a suspected felon who was fleeing their jurisdiction. In Public Act 91-0319, however, police officers were given "full authority and power" to act in a "police district." 65 ILCS 5/7-4-8. A "single police district" is defined as territory embraced within the corporate limits of adjoining municipalities within the same county. 65 ILCS 5/7-4-7. Under §5/7-4-8, therefore, an officer has full authority and power in his own municipality and in any adjoining municipality in the same county.

Thus, a police officer who was in the village of Southern View and who saw a car speeding on the northbound lanes of 6<sup>th</sup> Street, which were outside the Southern View limits but in the adjoining municipality of Springfield, had full authority to stop the driver.

2. In the alternative, 725 ILCS 5/107-4(a-3)(1) & (2) provide that an officer may make a stop outside his or her primary jurisdiction if the initial crime occurred within that jurisdiction, or where an on-duty officer becomes personally aware of the immediate commission of a felony or misdemeanor. Because the officer personally observed the commission of a Class B misdemeanor where he saw defendant driving 26 miles over the speed limit, he was authorized to make a stop.

**§§44-9, 44-13 Birchfield v. North Dakota**, \_\_\_ U.S. \_\_\_, 136 S.Ct. 2160, \_\_\_ L.Ed. \_\_\_ (2016) (No. 14-1468, 6/23/16)

In deciding whether a warrant is needed under the search incident to arrest doctrine, the Court generally weighs the degree of intrusion into a person's privacy against the State's legitimate interest in conducting the search. Using this balancing test, the Court concluded that when a person is arrested for drunk driving, a warrant is required for a blood alcohol test but not for a breath test.

The Court first found that breath tests do not implicate significant privacy concerns. First, the physical intrusion is almost negligible, "no more demanding than blowing up a party balloon." And people have no possessory interest in or emotional attachment to the air in their lungs. All the air used in a breath test would sooner or later be exhaled even without the test.

Second, breath tests only reveal one bit of information, the amount of alcohol in the subject's breath. No sample of anything is left with the police. Finally, a breath test is not likely to cause any embarrassment beyond that inherent in an arrest. The act of blowing into a machine is not inherently embarrassing and the tests are normally conducted in private settings.

The Court found blood tests to be a different matter. They entail piercing the skin to extract a part of the subject's body, an act significantly more intrusive than blowing in a tube. Humans continuously exhale air but do not regularly shed blood. And a blood test provides authorities with a sample that can be preserved and used to extract information beyond a simple blood alcohol reading.

Finally, the Court held that the State has a paramount interest in preserving the safety of its highways. Alcohol consumption is a leading cause of traffic fatalities,

and the Court's cases have long recognized the "carnage" caused by drunk drivers. The State thus has a compelling interest in deterring drunk driving.

Balancing these interests, the Court concluded that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but does not permit warrantless blood tests.

## **SENTENCING**

# §§45-1(a), 45-1(b)(2)

**People v. Hunter**, 2016 IL App (1st) 141904 (No. 1-14-1904, 6/30/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

- 3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.
- 4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

## §45-1(b)(2)

**People v. Rizzo**, 2016 IL 118599 (No. 118599, 6/16/16)

1. A proportionate penalties challenge under the Illinois constitution can be based on either of two theories. First, the defendant can argue that the penalty for an offense is harsher than the penalty for a different offense which contains identical elements. Second, the defendant can argue that the penalty for a particular offense is so disproportionate that it shocks the moral sense of the community or is cruel and degrading.

Here, the trial court concluded that the prohibition of supervision for aggravated speeding (*i.e.*, more than 40 mph in excess of the speed limit (625 ILCS 5/11-601.5(b)) was cruel and degrading. In making the finding, the trial court compared aggravating speeding to other misdemeanors for which supervision is also precluded, and concluded that aggravated speeding is a less serious offense because it does not involve bodily injury or physical harm.

The Supreme Court rejected the trial court's finding, concluding that the lower court had in effect revived the discredited cross-comparison test for evaluating proportionate penalties claims. The court concluded that even assuming that supervision, which is a statutory deferral of prosecution, constitutes a "penalty," the prohibition of supervision

is not in any sense so shocking or degrading as to violate the proportionate penalties clause:

[T]he legislature's prohibition of the dispositional option of supervision . . . does not even approach the "cruel and degrading" standard requisite for a finding of unconstitutionality. We do not believe our society has devolved to the permissive point that the legislature is obligated to provide an escape hatch for those who have shown such a blatant disregard for posted speed restrictions.

- 2. The court also found that the trial judge erred by considering the collateral consequences of a misdemeanor conviction, such as being required to disclose a conviction on job or loan applications, as factors in determining whether there is a proportionate penalties violation. The proportionate penalties clause applies only to the criminal process involving direct action by the government to inflict punishment, and not to possible actions by non-governmental actors.
- 3. The court also rejected the argument that due process is violated by the prohibition of supervision for aggravated speeding. Where legislation does not affect a fundamental constitutional right, the rational basis test is applied to determine whether a statute violates due process. A statute attacked on due process grounds will be upheld so long as it bears a reasonable relationship to the public interest sought to be protected and the means employed are a reasonable method of achieving the desired objective. The court concluded that because the legislature intended to address excessive speeding, which has a potential of creating grave injury to the public, placing restrictions on the dispositional option of supervision is not an unreasonable or arbitrary means of addressing the perceived evil.

The trial court's finding of unconstitutionality was reversed and the cause remanded for further proceedings.

# **§45-5 People v. Sanders**, 2016 IL App (3d) 130511 (No. 3-13-0511, 6/13/16)

1. Generally, the sentencing court may not consider as aggravation a fact which is inherent in the offense of which the defendant was convicted. Where the trial court gives weight to a factor which is inherent in the offense, the cause must be remanded for re-sentencing unless the court can determine that the weight given to the improper factor was insignificant.

The court concluded that the trial court erroneously considered a factor inherent in the offense of murder - that defendant's conduct threatened or caused serious harmwhere it noted the improper factor, acknowledged that it was inherent in the offense, but considered it nonetheless.

2. The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. **People v. Clark**, 2016 IL 118845.

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

Defendant's sentence was reversed and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Vicki Kouros, Ottawa.)

## \$45-9(c)(3)

**People v. Alvarez**, 2016 IL App (2d) 140364 (No. 2-14-0364, 6/20/16)

Under 730 ILCS 5/5-8-4(d)(1), consecutive sentencing is mandatory where the defendant is convicted of a Class X felony during which he inflicted "severe bodily injury." In addition, under 720 ILCS 5/8-4(c)(1)(D) a 25-year to life enhancement is required where the defendant committed attempt first degree murder during which he personally discharged a firearm and caused "great bodily harm and permanent disfigurement."

Defendant was convicted of two counts of attempt first degree murder under an indictment which charged that he had personally discharged a firearm causing great bodily harm, permanent disability, or permanent disfigurement. At sentencing, the trial court stated that consecutive sentences were mandatory because, "as previously found," defendant personally discharged a firearm and inflicted "severe bodily injury." In reality, the trial court had not made a specific finding about "severe bodily injury," and made only a finding concerning "great bodily harm." The trial judge also imposed 25-year enhancements under 720 ILCS 5/8-4(c)(1)(D).

1. The Appellate Court held that the legislature's use of "great bodily harm" and "severe bodily injury" were not equivalent and were intended by the legislature to mean different things. Thus, a finding of having inflicted "great bodily harm" does not equate to inflicting "severe bodily injury" for purposes of mandatory consecutive sentencing. "[W]ithout the trial court's explicit finding of 'severe bodily injury,' we decline to uphold

the imposition of consecutive sentences pursuant to section 5-8-4(d)(1) of the Code solely on its finding of 'great bodily injury' in connection with a sentencing enhancement."

2. The court rejected the argument that the sentences could be merely modified to run concurrently, and remanded the cause for the trial court to determine whether consecutive sentences were required.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

# $\S45-9(c)(5)$

**People v. Lashley**, 2016 IL App (1st) 133401 (No. 1-13-3401, 6/30/16)

If the defendant was "in the custody of the Department of Corrections" when he committed an offense, the sentence shall be served consecutively to the sentence under which he was "held" in custody. 730 ILCS 5/5-8-4(d).

Defendant was sentenced to Cook County's impact incarceration program, which lasts from 120 to 180 days, followed by a mandatory term of monitored release. 730 ILCS 5/5-8-1.2. When defendant committed the current offense, he was on monitored release from the impact incarceration program. The trial court ordered the sentence for the current offense to run consecutive to the impact incarceration sentence.

The Appellate Court held that the consecutive sentences were improper. The court found that it was ambiguous whether section 5-8-4(d) applied to defendant and thus under the rule of lenity the statute had to be interpreted in defendant's favor. The statute's applicability was ambiguous for two reasons. First, the phrase "in the custody of the Department of Corrections" could reasonably refer only to the Illinois Department of Corrections, not a Cook County impact program. Second, the word "held" could reasonably exclude a defendant on monitored release.

Under the rule of lenity, ambiguous criminal statutes will generally be construed in a defendant's favor. Since section 5-8-4(d) was ambiguous as applied to defendant, the rule of lenity required that the construction of the statute favoring defendant must be applied, making consecutive sentences inapplicable.

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right. The case was remanded for resentencing to concurrent terms.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

## §45-14(a)

## **People v. Sanders**, 2016 IL App (1st) 121732-B (No. 1-12-1732, 6/28/16)

- 1. A defendant may file a successive petition if he can show cause and prejudice. 725 ILCS 5/122-1(f). To establish cause and prejudice, a defendant must show that an objective impediment precluded him from raising the issue in an earlier proceeding and that the claimed errors resulted in actual prejudice.
- 2. A jury convicted defendant, who was 17 at the time of the offense, of murder and two counts of attempt murder. The trial court sentenced defendant to consecutive terms of 40 years for murder and 30 years for each count of attempt murder, for a total of 100 years imprisonment. In sentencing defendant, the court stated that it could sentence him to natural life, "but because of your young age" and potential for rehabilitation "I am not going to do that." But the court stated that it would impose a sufficiently long sentence so that society would not need to worry about defendant committing similar crimes in the future.

Defendant eventually filed a second successive postconviction petition arguing that the trial court did not properly consider his youth in imposing sentence, and that the recent case of **Graham v. Florida**, 560 U.S. 48 (2010) changed the law applicable to juvenile sentencing providing cause for his failure to raise the issue earlier. The trial court denied leave to file.

3. The Appellate Court held that the trial court violated the Eighth Amendment by imposing a *de facto* life sentence without considering the special circumstances of defendant's youth. And the Supreme Court decisions in **Graham** and **Miller v. Alabama**, 567 U.S. \_\_\_\_ (2012), substantially changed the law concerning juvenile sentencing thus providing cause and prejudice for filing a successive petition.

The Appellate Court noted that defendant would need to serve at least 49 years of his 100 year sentence before he would be eligible for parole. A prisoner has a life expectancy of only 64 years, meaning defendant would be effectively imprisoned for the rest of his life. But the trial court did not consider the special circumstances of youth in imposing sentence. The Appellate Court reversed the denial of defendant's successive petition and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

## SEX OFFENSES

## **§46-7**

**People v. Manskey**, 2016 IL App (4th) 140440 (No. 4-14-0440, 6/14/16)

- 1. Under the Sex Offender Registration Act a defendant must provide the authorities with accurate information, including his current address. 730 ILCS 150/3(a). To prove that a defendant violated the Act by failing to accurately provide his current address, the State must show that defendant knowingly or willfully gave the authorities false information about his current residential address. The Act defines place of residence as any place a defendant resides for three or more days during any year.
- 2. Defendant was convicted of providing a false address to the authorities when he registered as a sex offender. Defendant told the authorities that he lived at 1212 N. Western Avenue. When the police went to that address, the owner told them that defendant was a friend of his son's and did not live there. The owner signed a statement saying defendant never lived at 1212.

The owner testified that he didn't know if defendant lived at 1212, but he gave defendant permission to stay in the basement of 1212 "as often as he wished," although he never checked to see if defendant had accepted his offer since the basement was a separate unit with its own entrance. The owner's son and defendant testified that defendant lived in the basement of 1212 at the time he registered.

3. The court held that the State failed to prove that defendant provided a false address. Although the owner told the authorities and signed a statement saying that defendant never lived at 1212, that did not provide proof that 1212 was not defendant's place of residence as defined under the Act. The Act defines place of residence to mean residing somewhere for three or more days, a meaning that differs from what place of residence means in common parlance, *i.e.*, a place where one lives permanently. If defendant had stayed in the basement of 1212 for an aggregate period of three days, he would have been an occasional guest in common parlance, but would not have lived at 1212, in the sense of staying there permanently.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Amanda Kimmel, Springfield.)

## SPEEDY TRIAL

## §§47-1(b), 47-3

**People v. Smith**, 2016 IL App (3d) 140235 (No. 3-14-0235, 6/9/16)

1. Under the speedy trial statute, a defendant must be tried within 120 days from the date he was taken into custody unless he has caused delay. 725 ILCS 5/103-5(a). A defendant does not need to demand trial to begin the 120-day period. Under the intrastate detainer statute, however, a defendant committed to the Illinois Department of Corrections must demand trial before the statutory speedy trial period of 160 days begins to run. 730 ILCS 5/3-8-10.

When a defendant is in custody awaiting trial in one county and charges are pending against him in another county, the 120-day speedy trial period does not begin to run until the proceedings in the first county end and defendant is held in custody by the second county. In order to be held in custody by the second county, the second county must serve a warrant on defendant while he is still incarcerated in the first county.

- 2. Defendant was indicted for an offense in Peoria County on March 20, 2012. At that time, defendant was incarcerated in Sangamon County awaiting trial for a Sangamon County offense. On June 24, 2012, an arrest warrant for the Peoria County offense was served on defendant. On June 11, 2013, defendant was sentenced for the Sangamon County offense. On July 12, 2013, defendant was transferred to the Illinois Department of Corrections. On August 8, 2013 defendant was transferred to Peoria County and arraigned. Defendant answered ready for trial and the State sought several continuances. On October 24, 2013, defendant made a motion to dismiss based on a speedy trial violation. The trial court denied the motion.
- 3. The Appellate Court held that the State failed to bring defendant to trial within 120 days in violation of the speedy trial statute. Defendant was not committed to the DOC at the time he was sentenced in the Sangamon County case. Instead, defendant had been served with a warrant in the Peoria County case while he was awaiting trial in the Sangamon County case. As soon as defendant was sentenced in the Sangamon County case, the proceedings in that case terminated and the custody of defendant was legally transferred to Peoria County. Accordingly, the 120-day speedy trial period applied to defendant rather than the 160-day period that would have applied if defendant had been in the custody of the DOC.

Since the State failed to bring defendant to trial within 120 days, the Appellate Court ordered the charges against him dismissed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

## **STATUTES**

#### **§48-1**

**People v. Lashley**, 2016 IL App (1st) 133401 (No. 1-13-3401, 6/30/16)

If the defendant was "in the custody of the Department of Corrections" when he committed an offense, the sentence shall be served consecutively to the sentence under which he was "held" in custody. 730 ILCS 5/5-8-4(d).

Defendant was sentenced to Cook County's impact incarceration program, which lasts from 120 to 180 days, followed by a mandatory term of monitored release. 730 ILCS 5/5-8-1.2. When defendant committed the current offense, he was on monitored release from the impact incarceration program. The trial court ordered the sentence for the current offense to run consecutive to the impact incarceration sentence.

The Appellate Court held that the consecutive sentences were improper. The court found that it was ambiguous whether section 5-8-4(d) applied to defendant and thus under the rule of lenity the statute had to be interpreted in defendant's favor. The statute's applicability was ambiguous for two reasons. First, the phrase "in the custody of the Department of Corrections" could reasonably refer only to the Illinois Department of Corrections, not a Cook County impact program. Second, the word "held" could reasonably exclude a defendant on monitored release.

Under the rule of lenity, ambiguous criminal statutes will generally be construed in a defendant's favor. Since section 5-8-4(d) was ambiguous as applied to defendant, the rule of lenity required that the construction of the statute favoring defendant must be applied, making consecutive sentences inapplicable.

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right. The case was remanded for resentencing to concurrent terms.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

## **§48-1**

**People v. Patterson**, 2016 IL App (1st) 101573-B (No. 1-10-1573, 6/21/16)

Under 5 ILCS 70/4, where the legislature does not provide a specific provision concerning the retroactive or prospective application of amendatory acts, procedural amendments are to be applied retroactively while substantive amendments are applied prospectively. Where the Juvenile Court Act was amended during the respondent's appeal to increase the minimum age for mandatory transfer from 15 to 16, the legislation did

not provide whether the provision was to be applied retroactively, and defendant had been 15 at the time of the offense, the court concluded that the change in age for mandatory transfer constituted a procedural change that was to be applied retroactively to cases on direct appeal.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

## **§48-2**

# **People v. Hunter**, 2016 IL App (1st) 141904 (No. 1-14-1904, 6/30/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

- 2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.
- 3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty

but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

## **§48-3(a) People v. Rizzo**, 2016 IL 118599 (No. 118599, 6/16/16)

A party raising a constitutional challenge has a heavy burden to rebut the strong presumption that statutes are constitutional. Courts have a duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of the statute's validity.

Facial and as-applied challenges are not interchangeable. An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. It is impossible for a court to make an "asapplied" determination of constitutionality without an evidentiary hearing and findings of fact.

In contrast, a facial challenge requires a showing that the statute is unconstitutional under any set of facts. Thus, the specific facts related to the challenging party are irrelevant.

## **THEFT**

## **§49-7**

**People v. Lindsey**, 2016 IL App (1st) 141067 (No. 1-14-1067, 6/14/16)

Theft of property not exceeding \$500 is a Class A misdemeanor. 720 ILCS 5/16-1(b)(1). Theft is elevated to a Class 4 felony if it is committed in a place of worship. 720 ILCS 5/16-1(a)(1)(A). A place of worship is a "church, synagogue, mosque, temple, or other building...used primarily for religious worship and includes the grounds of a place of worship." 720 ILCS 5/2-15b.

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Although **Apprendi** errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that **Apprendi** errors have been found harmless only where the evidence was "uncontested and overwhelming," but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant's conviction to a Class A misdemeanor.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

#### TRAFFIC

## **§50-1**

**People v. Rizzo**, 2016 IL 118599 (No. 118599, 6/16/16)

The court rejected the arguments that the proportionate penalties clause and due process are violated by the prohibition of supervision for aggravated speeding (i.e., more

than 40 mph in excess of the speed limit (625 ILCS 5/11-601.5(b)). The trial court's finding of unconstitutionality was reversed and the cause remanded for further proceedings.

## TRIAL PROCEDURES

**§52-2** 

**People v. Henry**, 2016 IL App (1st) 150640 (No. 1-15-0640, 6/30/16)

At his trial for first-degree murder, aggravated battery with a firearm, and unlawful use of a weapon, defendant failed to return to court when the proceedings ended on the first day. Bond was revoked and a warrant was issued for defendant's arrest. The trial continued, and defendant was convicted and sentenced *in absentia*.

Defendant was arrested some three years later, and began to serve the sentence that had been imposed *in absentia*. He then filed a post-conviction petition arguing that trial counsel had been ineffective for failing to investigate and call alibi witnesses at trial.

The State argued that by absenting himself from trial, defendant "chose to forego" his alibi defense. The court rejected this argument, noting that defendant's voluntary absence from trial may waive the rights to be present and confront witnesses but does not waive the right to the effective assistance of counsel. The court noted that under Supreme Court Rule 401, a defendant charged with an offense punishable by imprisonment may waive counsel only in open court and only after being properly admonished by the trial court of the consequences of a waiver. Because there was no such waiver in the record, defendant's flight did not waive his right to the effective assistance of counsel.

However, the court went on to find that defense counsel was not ineffective.

(Defendant was represented by Assistant Defender Roxanna Mason, Chicago.)

## UNLAWFUL USE OF WEAPONS

**§53-1** 

**People v. Daniels**, 2016 IL App (1st) 142130 (No. 1-14-2130, 6/20/16)

Defendant pled guilty to aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6(a)(1)(3)(B). After serving his sentence, defendant filed a 2-1401 petition challenging

his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.

On appeal, the State conceded that defendant's conviction should be vacated. The Appellate Court agreed. Although **Aguilar** only addressed subsection (3)(A), the underlying rationale extended to defendant's conviction under subsection (3)(B). Subsection (3)(A) prohibits the possession of an uncased firearm that is "loaded and immediately accessible," while subsection (3)(B) prohibits the possession of an uncased firearm that is "unloaded and the ammunition for the weapon is immediately accessible." Unless **Aguilar** applied to subsection (3)(B), the constitution would illogically prohibit the possession of an unloaded gun but not the possession of a loaded gun. **Aguilar** thus applies to subsection (3)(B).

Defendant's conviction was vacated.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

# **§53-2 People v. McFadden**, 2016 IL 117424 (No. 117424, 6/16/16)

A statute that is facially unconstitutional is void *ab initio*, meaning that it was constitutionally infirm from the moment of its enactment and is therefore unenforceable. A defendant may not be prosecuted under a criminal statute that is facially unconstitutional and must be allowed to vacate a judgment of conviction premised on that statute.

Defendant was convicted of unlawful use of a weapon by a felon (UUWF) based on possessing of a firearm after he had been convicted of aggravated unlawful use of a weapon (AUUW). The UUWF statute prohibits the possession of a firearm by any person who has been convicted of a felony. 720 ILCS 5/24-1.1(a).

Defendant pled guilty to AUUW in 2002. He pled guilty to UUWF in 2008. In 2013, the Illinois Supreme Court held that the portion of the AUUW statute under which defendant was convicted was facially unconstitutional. **Aguilar**, 2013 IL 112116. On direct appeal from his UUWF conviction, defendant argued that the State failed to prove an essential element of the offense since the predicate offense, AUUW, was based on a statute that was facially unconstitutional and void *ab initio*.

The Illinois Supreme Court rejected defendant's argument. The court held that the void *ab initio* doctrine would enable defendant to vacate his 2002 AUUW conviction by filing an appropriate pleading. But a conviction remains valid until a court with proper reviewing authority has declared otherwise. Although **Aguilar** may provide a basis for vacating defendant's AUUW conviction, it did not automatically overturn that conviction.

Thus when defendant committed UUWF he had a valid felony conviction that made it unlawful for him to possess firearms.

Justices Kilbride and Burke in dissent would have held that a conviction based on a facially unconstitutional statute could never have been validly established or prosecuted and thus could not form the predicate felony for UUWF.

(Defendant was represented by Assistant Defender Pam Rubeo, Chicago.)

#### WAIVER - PLAIN ERROR - HARMLESS ERROR

 $\S 56-1(b)(7)(a)$ 

**People v. Coan**, 2016 IL App (2d) 151036 (No. 2-15-1036, 6/29/16)

Under the invited-error doctrine, a defendant may not request to proceed in one manner at trial and later argue on appeal that error occurred. To permit a defendant to use the exact ruling or action that he procured at trial as a means of reversal on appeal would offend notions of fair play and encourage duplicitous behavior. Even plain-error review is forfeited when a defendant invites the error.

Here defendant failed to object to an incorrect jury instruction tendered by the State. The court rejected the State's attempt to portray this as invited error. The State, not defendant, tendered the instruction, and the failure to object did not mean that defendant agreed on the record to using the instruction. In this circumstance, the issue should be reviewed under the plain error doctrine.

 $\S56-2(a), 56-2(b)(5)(a)$ 

**People v. Sanders**, 2016 IL App (3d) 130511 (No. 3-13-0511, 6/13/16)

The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. **People v. Clark**, 2016 IL 118845.

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

(Defendant was represented by Assistant Defender Vicki Kouros, Ottawa.)

# $\S 56-2(b)(1)(a)$

**People v. Robinson**, 2016 IL App (1st) 130484 (No. 1-13-0484, 6/17/16)

An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. 720 ILCS 5/10-1(a)(3). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. 720 ILCS 5/10-1(a)(1).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

The court reversed the aggravated kidnapping conviction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

## $\S 56-2(b)(5)(a)$

**People v. Lashley**, 2016 IL App (1st) 133401 (No. 1-13-3401, 6/30/16)

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

## §56-3(c)(9)

**People v. Lindsey**, 2016 IL App (1st) 141067 (No. 1-14-1067, 6/14/16)

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The court reduced defendant's conviction to a Class A misdemeanor.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)